No. 1946

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COLMAN COMPANY (a corporation),
Appellant,

vs.

T. W. WITHOFT, Trustee in Bankruptcy of the Estate of FRANK H. SWEENEY, Bankrupt,
Appellee.

In the Matter of
FRANK H. SWEENEY,
Bankrupt.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

Statement of Facts.

Before commencing our argument, we would suggest two amendments to the Statement of Facts contained in appellant's brief. The first is that the statement should show that claimant, appellant herein, not only had to close a contract for the rescission of the lease, but also had to *negotiate* its terms (Tr.

pp. 20-21); and secondly, the date of payment of the April rent, to-wit: April 1, 1909 (Tr. p. 21), should appear in counsel's summary. We think these amendments bring out more clearly the fact that on the 31st day of March, 1909, the date of the filing of the petition in bankruptcy, there was an absolute contingency of facts whether there would ever be any liability on the part of the bankrupt to respond either upon the agreement to pay one-half of the April installment of rent, or upon the subsequent agreement looking towards the rescission of the lease.

Argument

There is but one question for this Court to determine—Are claims arising under Subdivision 4 of Section 63a of the Bankruptcy Act of 1898 limited in point of time as are claims arising under Subdivision 1 of said section? In other words, may a claim based upon contract, which is contingent at the time of the filing of the petition but which matures within the year, be proved in bankruptcy under Subdivision 4, though not provable under Subdivision 1?

The lower Court answered the question in the negative and expunged appellant's claim.

A CLAIM MUST BE A DEBT WHEN PRESENTED.

A perusal of Section 63a, Subdivisions 1 and 4, respectively, of the Bankruptcy Act of 1898, will

show that the word "debts" must be read into both subdivisions. A claim to be provable must be based upon a debt when presented. A debt is a present obligation to pay a fixed sum of money, and is not a mere contingency which may ripen into such an obligation at some time in the future. Such is the definition of a debt as laid down in the authorities.

The People etc. v. Arguello, 37 Cal. 524, at 525;

Re Adams, 12 Daly (N. Y.) 454-7;

Saleno v. City of Neosho, 48 Am. St. Rep. 653-9;

Loveland on Bankruptcy (3rd Ed.), page 342.

> "A sum of money which is certainly and in all events payable is a debt, without regard to the fact whether it be payable now or at a future time. A sum payable on a contingency, however, is not a debt, or does not become a debt until the contingency has happened."
>
> *The People v. Arguello, supra,* page 525.

Loveland, supra, defines a debt in bankruptcy, at page 342 of his work, as follows:

> "Where a liability of the bankrupt is not fixed so that it can be liquidated by legal proceedings instituted at the time of the bankruptcy, it is not a debt. It is deemed so far contingent that it cannot be proved in bankruptcy, nor is it released by the bankrupt's discharge. A sum of money payable upon a contingency is not provable because it does not become a debt until the contingency has happened."

A claim, then, to be provable must be based upon a debt in existence at the time the proof is offered. We do not think appellant will dispute this proposition. Such being the case, at what particular point of time must the present obligation or debt come into existence to permit proof and participation in bankruptcy proceedings? There is but one answer:

THE STATUS OF A PROVABLE CLAIM IS FIXED AS OF THE DATE OF THE FILING OF THE PETITION.

Bankruptcy is intended to wipe out old items and to give a clean slate. The policy of the law is only accomplished when this result may be obtained with expedition. There is but one way to obtain such result: that is to have some fixed point of time at which all claims or demands against a bankrupt's estate must accrue in order that there may be no uncertainty as to the participants in the bankruptcy fund. Under the Bankruptcy Act of 1898 the date of cleavage is the date of the filing of the petition.

Remington on Bankruptcy, page 374;
Re Burka (D. C. Missouri), 5 A. B. R. 12;
Re Garlington, 8 A. B. R. 602 (D. C. Texas);
Re Adams, 12 A. B. R. 368 (D. C. Mass.);
Re Coburn (D. C. Mass.), 11 A. B. R. 212;
Swarts v. Fourth National Bank (Ct. Ct. of App., 8th Ct.), 8 A. B. R. 673;
Phoenix etc. Co. v. Waterbury, 20 A. B. R. 140;
Moulton v. Coburn (Ct. Ct. of App., 1st Ct.), 131 Fed. 201;

Re Bingham (D. C. Vermont), 94 Fed. 796;
Re Swift (Ct. Ct. of App., 1st Ct.), 112 Fed. 315;
Slocum et al. v. Soliday (Ct. Ct. of App., 1st Ct.), 25 A. B. R. 460 (April Advance Sheets);
In the Matter of Cress-McCormick Co. (D. C. Miss.), 25 A. B. R. 464 (April Advance Sheets);
Re Roth & Appel (D. C.), 174 Fed., page 64, at 69;
Re Roth & Appel (Ct. Ct. of App., 2nd Ct.), 181 Fed. 667; 22 A. B. R. 504.

Remington, at page 374 of his work on Bankruptcy, lays down the rule as follows:

> "The question whether or not a debt is provable turns upon its status at the time of the filing of the petition."

As illustrating that the date of filing the petition is the date of cleavage in bankruptcy, we will quote from the case of *Moulton v. Coburn et al., supra,* 131 Fed. 201, wherein the Court, in passing upon the question whether or not the proper number of creditors had united in the petition in bankruptcy, had occasion to use the following language at page 204:

> "We are of the opinion that the District Court was right in holding that upon a petition by less than three creditors it must appear that there were less than twelve creditors at the date of filing the petition, and therefore that the subsequent acts of the creditors and of the voluntary assignee need not be considered. To take

any other date for the count would result in uncertainty and confusion."

In *Re Swift, supra,* 112 Fed. 321, the Court, in speaking of the Bankruptcy Act, uses this language:

> "That part of the present bankruptcy act which described what debts may be proved does not repeat at all points the words 'owing at the time of the filing of the petition', but it is impossible to consider it other than as though it did thus repeat them. There can be no question that it is sufficient if the debt existed at the point of time of the filing of the petition in bankruptcy."

In *Re Bingham, supra,* 94 Fed. 796, the Court lays down very positively the rule that obligations must be fixed and owing at the time of the filing of the petition; otherwise they are not provable. The following language is taken from page 796 of the decision.

> "At the time of the filing of the petition the bankrupt owed James E. Hartshorn (set-off claimant) $110.50; Hartshorn owed the bankrupt $554.70, and both were holden on a note of $1200.00 to a savings bank, one-half of which each ought to pay. The bank has proved its claim and Hartshorn has taken up the note. One-half of what he paid was his own debt, and he can have no claim against the bankrupt estate growing out of that. He insists that the balance of direct claims between him and the bankrupt should be set off against what he has paid that the bankrupt ought to have paid, and that the balance should stand as a valid claim in his favor against the estate. The bankrupt was impliedly bound to save him harmless from this part of that debt and has not done so; *but the detriment has occurred since the filing of the petition, and until that occurrence Hartshorn*

had no provable claim on that account. By this bankrupt act all claims turn upon their status at the time of the filing of the petition, and decisions upon statutes having different provisions in this respect will not afford safe guides for the construction of this." (Italics ours.)

A perusal of the above case will show that it is on all fours with the case to be decided by this Court, as in that case there was a contract to answer for a certain proportion of a certain obligation which did not mature and become fixed until after the filing of the petition in bankruptcy; the Court consequently held that no claim arose on such contract which could be set off or proved in the bankruptcy proceedings.

There is no question but that the date of the filing of the petition is the all-important date in bankruptcy. A perusal of the above cases will demonstrate this proposition. On that date the actors in the proceeding are identified and their respective rights are determined. Any other conclusion would lead to uncertainty in ascertaining the creditors entitled to participate in the bankruptcy proceeding; to delay in closing up bankrupt estates; and generally to injustice to both bankrupt and creditors.

CLAIMS CONTINGENT AT THE TIME OF THE FILING OF THE PETITION NOT PROVABLE.

Under the Bankruptcy Act of 1898, contingent claims are not provable.

Dunbar v. Dunbar, 190 U. S. 340;

Remington on Bankruptcy, page 381, Section 640;

Re Mahler (D. C. Michigan), 5 A. B. R. 453;
Re Arnstein (D. C. New York), 4 A. B. R. 246;
Re Collignon (D. C. New York), 4 A. B. R. 250;
Watson v. Merrill (Ct. Ct. of App., 8th Ct.), 14 A. B. R. 453;
Re Imperial Brewing Co. (D. C. Missouri), 16 A. B. R. 110;
Re Inman (D. C. Georgia), 22 A. B. R. 524;
Re Swift (Ct. Ct. of App., 1st Ct.), 112 Fed. 315;
Slocum v. Soliday, supra;
Re Roth & Appel (D. C.), *supra;*
Re Roth & Appel (Ct. Ct. of App.), *supra;*
Cress-McCormick Co., supra;
Goding v. Rosenthal, 61 N. E. 222;
Re Rome (D. C. N. J.), 162 Fed. 971.

We quote from the case of *Goding v. Rosenthal, supra:*

> "By the execution of the bond of March 29, 1898, to August, in which the present plaintiff was a surety for the present defendant, the latter incurred an obligation to the present plaintiff to reimburse him any amount which he might be compelled, as surety, to pay upon the bond. This obligation was in force when, on February 13, 1900, the present defendant's petition in bankruptcy was filed. It was an obligation founded upon an implied contract, and it was evidenced by an instrument in writing, and in one sense it was a fixed liability. But no debt was absolutely owing at the time of the petition. *The obligation was contingent upon*

> *the happening of a breach of the bond and a payment by the surety.* The payment by the surety was not until June 12, 1900, and there seems to have been no breach of the bond before that date. Therefore, neither the pledgee in the bond nor the surety could prove in the bankruptcy proceedings a claim founded upon the bond, unless merely contingent claims are provable under the Bankruptcy Act of 1898." (Italics ours.)

In the above case it was determined that there was no provable claim.

The rule as to contingent claims is very clearly laid down by the Supreme Court of the United States in the case of *Dunbar v. Dunbar, supra,* at page 350, as follows:

> "We do not think that by the use of the language in Section 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove."

It is now important to determine what really constitutes a contingent claim, and by what criterion it may be judged. We find no clearer definition than is to be found in Remington in his work on Bankruptcy, Section 641, page 382, as follows:

TEST OF CONTINGENCY.

> "The test as to whether a claim is really contingent or is simply unliquidated or unascertained by legal proceedings would seem to be this: Have all the facts necessary to be proved to fasten liability already occurred? If so, the claim is not contingent, although the liability and the extent of damages may not yet have

> been ascertained by the consideration of a court, as evidenced by judgment or decree, nor even the full extent of damages arising been all suffered. The contingency, in other words, is a contingency of facts necessary to fasten liability at all, not a contingency of the court's judgment on the facts, nor a contingency as to the extent of the damages resulting from the injury. Again, so long as it remains uncertain whether the contract or liability will ever give rise to an actual duty or liability and there is no means of removing the uncertainty by calculation, it is too contingent to be a provable debt."

Applying the above test to the Colman claim, it will immediately appear that the claim was contingent at the time of the filing of the petition in bankruptcy. The April rent had not as yet become payable, nor had the same been paid by appellant. The contract for the rescission of the lease was as yet unexecuted. If the Court had been called upon to calculate the amount of appellant's claim on March 31, 1909, the date of the filing of the petition, it would have been absolutely impossible for it to have done so. At that time there was a mere contingency; there was no binding or fixed obligation upon the bankrupt to pay anything to the Colman Company; there could be no such obligation until, in the first place, claimant had paid the April rent in full, or at least had paid more than its proportionate part thereof; and, in the second, it had obtained a rescission of the lease upon the terms stipulated. Many things might have happened before either of these contingencies had occurred, and at the time of the filing of the petition it was impossible for anyone to

say that the bankrupt would ever become liable on either one of his covenants. At that time there was an absolute "contingency of facts necessary to fasten liability" upon Sweeney, the bankrupt.

CLAIMS ARISING UNDER SUBDIVISION 4 OF SECTION 63a OF THE BANKRUPTCY ACT OF 1898 MUST BE "OWING" AT THE TIME OF THE FILING OF THE PETITION IN BANKRUPTCY.

The weight of authority is that claims arising under Subdivision 4 of Section 63a of the Bankruptcy Act of 1898 must be "fixed"—as are claims under Subdivision 1—at the time of the filing of the petition, to be provable in bankruptcy.

Remington on Bankruptcy, page 406, Section 669;

Remington on Bankruptcy, page 407, Section 672;

Remington on Bankruptcy, page 410, end Section 672;

Collier on Bankruptcy (7th Ed., 1909), page 711;

McCabe v. Patton (Ct. Ct. of App., 3rd Ct.), 23 A. B. R., page 335;

Re Swift, supra;

Re Bingham, supra;

Re Adams, supra;

Re Burka, supra;

Re Roth & Appel (D. C.), *supra;*

Re Roth & Appel (Ct. Ct. of App.), *supra;*

Re Inman, supra;
Slocum v. Soliday, supra;
In the Matter of Cress-McCormick Co., supra.

The rule is very clearly stated, and at the same time the contrary rule as exemplified in the *Gerson (Moch v. Market Street Bank)* and *Smith* cases, relied upon by appellant, is commented upon adversely, by Remington at page 410 of his work on Bankruptcy in the following language:

> "Whether one import the clause 'absolutely owing at the time of the filing of the petition' into the subsequent classes or not, nevertheless from the nature of things it is a necessary qualification of all the subsequent classes. The date of the filing of the petition is the date of cleavage; contractual relations not then merged into provable debts are not dissolved, and in the absence of statutory provisions permitting the proof of claims by those secondarily liable for their payment, doubtless claims upon endorsements before maturity and default would be held to be contingent and not provable. But the statute, by thus permitting one who is secondarily liable for the bankrupt's debt to prove the debt in the name of the creditor (which may be done even before the maturity of the debt by a proper rebate of interest), makes the debt of the one secondarily liable quasi provable, and therefore dischargeable, thus protecting the rights of the surety and of the bankrupt as well. *But all this is done by way of exception, necessarily implied, to the rule that contingent claims are not provable. Based upon their provability being by way of exception, the criticisms and distinctions pointed out in In re Gerson, supra, and In re Smith, supra, become immaterial.*"

Again, the rule is stated in the case of *In re Adams, supra,* at page 369, as follows:

> "But a creditor cannot prove for an indebtedness arising between the filing of the involuntary petition and adjudication. This appears from the analogy of Section 63a, 1, 2, 3 and 5, as applied to the interpretation of clause 4, Act July 1, 1898. * * * In clauses 1 and 4, for example, the limit of time must be the same, inasmuch as clause 4 includes clause 1, and if clause 4 were less limited in point of time, the limit imposed on clause 1 would become nugatory."

We would also call the Court's attention to the comment upon the *Gerson* case, the foundation of the doctrine relied upon by appellant, made by Remington in a note on page 1615 of his treatise. The criticism shows how illogical is the *Gerson* case, and sets forth very sound reasons for the doctrine of that case not being extended any further than its terms permit; that is, that the rule there laid down should be restricted to commercial paper and not extended to contracts and claims of the character here involved.

Collier in his work on Bankruptcy (7th Ed.), *supra,* at page 711, states the rule in this language:

> "Subdivision 4 does not repeat the words 'absolutely owing at the time of the filing of the petition against him', but it is probable that they should be read therein, for it is evident that the status of the debt founded on a contract is to be determined as of the time when the petition was filed."

That the doctrine of the *Gerson* case should not be extended to cases other than commercial paper,

and that the case of *In re James Dunlap Carpet Company,* cited by appellant, is unsound in point of law, will appear by a reference to the language used in the case of *In re Inman,* 22 A. B. R. 524, at page 536, as follows:

> "I can see no similarity at all between such a case (meaning the *Gerson* case) and the case of an employee seeking to prove for salary to be earned by services to be rendered in the future. The endorsement in the *Moch* case was a fixed liability which the endorser had undertaken for the bankrupt and which was in existence before the bankruptcy proceedings commenced. * * * This is entirely different from a contract to render personal services. Such services depend upon the life, health and ability otherwise of the employee to render the services, and also upon the life certainty, and perhaps other contingencies as to the employer."

In the last case where the question here involved was squarely raised, to-wit: *In re Roth & Appel, supra,* decided by the Circuit Court of Appeals of the Second Circuit, the Court decided in favor of the contention here made by appellee and uses the following language at pages 673-4 of the Opinion appearing in 181 Federal, in respect to the contention that, although a claim might not be provable under subdivision 1 of Section 63a, it might be provable under Subdivision 4 of said section:

> "But while it is not necessary, in order to reach a decision in this case, to determine whether 63a (4) is subject to the limitation contained in Section 63a (1), that debts to be provable must be absolutely owing at the time of the filing of the petition, *we think it the better view*

> *that it is so limited.* If it is not so limited, the limitations in the first subdivision are practically of no effect. All claims upon instruments in writing not provable under the first clause, because not absolutely owing at the time of the petition, might be proved as claims founded upon a 'contract express or implied', under the fourth clause, if no limitations are attached to the latter. We cannot regard this interpretation as tenable. *We think that the above clauses of 63a should not be considered as independent, but should be read together, and that the said limitation in the first clause should be considered as repeated in the fourth clause."* (Italics ours.)

The Court in the above case expressly approved the cases *In re Swift, supra,* and *In re Adams.*

Counsel quotes an excerpt from the Opinion of the lower Court, which would seem to indicate that the judge who decided this case had no definite opinions upon the subject. This impression is erroneous, however, as a perusal of the following language will show:

> "It is unnecessary for the Court at this time to comment on these authorities, or even refer to them, but it is enough to say that I have examined them all and examined the text books, and am impressed with the soundness of reasoning of Judge Hough and the Court of Appeals of the Second Circuit in the case of *Roth & Appel,* 174 Fed. 64, and the same case approved and reported in the 24th A. B. R. 534, supported as it is by the Circuit Court of Appeals of the First Circuit in *Re Swift,* 112 Fed. 366, and by the opinions of the text writers upon the bankruptcy law. The holding of the authorities is that the different clauses of Section 63a should not be construed as independent, but should be

> construed together, and therefore no debt is provable unless the facts fixing the liability exist at the time of the filing of the petition in bankruptcy; except, possibly, in cases of a bankrupt endorser of negotiable paper where the liability matures after the filing of the petition."

This brings us to a consideration of the argument and authorities cited by appellant.

REFUTATION OF APPELLANT'S ARGUMENT.

Counsel states on page 6 of his brief that the cases cited by appellee "all ignore the fact that Subdivi-" sion 4 of Section 63a is co-ordinate with Subdi-" vision 1 of the same section, and hence not con-" trolled or limited by it". This is not our opinion of the cases cited in our behalf. In all of them, where the proposition was squarely put before the Court, the conclusion reached was that Subdivisions 1 and 4 of Section 63a were not co-ordinate, but should be read together. Counsel attempts to pick flaws with this reasoning by stating that if Subdivision 4 is to be limited by Subdivision 1, then Subdivisions 2, 3 and 5 should be likewise so limited. The criticism is not just. Subdivisions 1 and 4 are upon kindred subjects, to-wit: contracts; Subdivisions 2, 3 and 5 have no relation to contracts. There is no analogy between Subdivisions 2, 3 and 5 and Subdivisions 1 and 4. The reason why Subdivisions 1 and 4 should be construed together, and why no such necessity requires a like construction in dealing

with Subdivisions 2, 3 and 5, is the elementary principle of statutory construction that statutes or parts of statutes *in pari materia,* that is, dealing with the same subject matter, should be so construed that one statute or portion of a statute should not be given such a meaning as to nullify other statutes or portions thereof upon the same subject matter. In other words, where a Court may adopt either one of two constructions, one of which tends to nullify a portion of a statute, while another tends to give force to all its parts, that construction should be adopted which will tend to give meaning and force to the statute as a whole.

Lewis' Sutherland Statutory Construction (2nd Ed.), Vol. 2, page 659, Sec. 344, and cases cited;

Atkins v. Disintegrating Co., 85 U. S. (18 Wall.) 272, at 301 et seq.

If counsel's construction is adopted, Subdivision 4, by being more unlimited as to time, nullifies Subdivision 1 of Section 63a of the Bankruptcy Act, as Subdivision 4 includes Subdivision 1, both dealing as they do with contracts.

A glance at the cases cited by appellant will show that each and every one of them is based upon *Moch v. Market Street Bank.* That case in terms—if the same be examined carefully—is restricted to commercial paper, and was not intended to apply to contracts or obligations of the character here involved. In fact, the Court expressly states that the decision

was not intended to cover obligations such as surety bonds where the liability and amount of liability depended upon future defaults.

In the case of *Cobb v. Overman,* 6 A. B. R. 324, cited by appellant, there was no question of the construction of Subdivision 4 involved, as the Court there determined that the liability at the time of the filing of the petition became fixed. And likewise in the case of *Hibbard v. Bailey,* cited by appellant, the Court holding in that case that at the time of the filing of the petition there was no longer any contingency as to the liability of the bankrupt, but that the same had become fixed long prior thereto by an order of the Orphan's Court.

The case of *In re Swift,* found *supra* in our authorities and cited by appellant, is against appellant rather than in his favor, as a consideration of the language at page 315 of the decision, as reported in 112 Federal, will show.

The case of *In re Semmer Glass Co.,* 14 A. B. R. 25, cited by appellant, deals with commercial paper and is, as we believe, not a case in point in determining this appeal.

The case of *In re Dunlap Carpet Co.,* cited by appellant, is a District Court decision, and is based upon the *Moch* case. The reasoning, in our opinion, is ill-considered and illogical, and, as we have before shown, was adversely commented upon in the case of *In re Inman, supra.*

In the case of *In re Caloris Manufacturing Co.,* 24 A. B. R. 611, cited by counsel, the decision therein is

not by a Circuit Court of Appeals, but is by the District Court of Pennsylvania, and was decided before the Circuit Court of Appeals' decision in the case of *In re Roth & Appel, supra.* The opinion is very unsatisfactory. The conclusion is really reached because the Court felt itself bound by the decision in the *Moch* case, which was rendered by the Circuit Court of Appeals in the Third Circuit, and consequently binding upon the District Court of Pennsylvania. An examination of the opinion will show that the judge was by no means satisfied with the decision, but that he reached the conclusion he did only because he felt bound by the decision in the *Moch* case.

The *Smith* case, which is counsel's chief authority, arose in and was decided by the District Court of Rhode Island, and the decision is based upon the *Moch* case, as a consideration of the opinion will disclose. The case deals with commercial paper. The decision is not an authority in favor of appellant; it in our opinion is restricted to commercial paper. If not so restricted, the decision is illogical and unsound, both in reason and in law. We would call attention to the comment upon this case appearing in the case of *In re Roth & Appel, supra,* 181 Fed., at page 673—a comment made by the Circuit Court of Appeals of the Second Circuit in 1910.

We will now examine the case of *In re Smith,* 17 A. B. R. 112, and we believe that without difficulty an analysis of that decision will demonstrate that it is not the authority that counsel would have it appear. The vice in the decision is threefold.

In the first place, the learned Judge overlooks the very important fact that in bankruptcy practically everything dates from the filing of the petition, such date being the date of cleavage. By overlooking this fact, uncertainty and delay follows. There should be some particular point of time at which all claims against a bankrupt's estate should accrue, so as to be provable, and from liability for which the bankrupt can obtain a discharge. With such a rule the participants in the trust fund at the same moment all come into being and are definitely identified. Under the construction adopted in the *Smith* case, the participants in the fund before the expiration of the year are left uncertain and never become identified until their claims mature. Great hardship is thereby worked. As all claims maturing within the year are provable, the creditors holding such unmatured claims, though participants in the bankruptcy proceedings, would have no standing in the Bankruptcy Court before their claims become provable; until such event they would be compelled to stand passively and helplessly by, without voice to protect their rights, and watch the estate assets exhausted in the payment of matured claims, there being no requirement in the bankruptcy law that the trust fund should be held until the year had expired. Yet these participants, having no standing in the bankruptcy proceeding until their claims mature, would be barred from all redress both as against the estate of the bankrupt and against him personally, for the reason that in the first place, the fund having been

exhausted, there would be no assets with which to pay their claims when matured, while in the second place, having provable claims, they would lose all redress against the bankrupt, for the reason that the discharge in bankruptcy relieves him from all liability on provable debts.

The *Smith* case is in error when it states that if the claim matured within the year after the filing of the petition, it is a claim which may be proven in bankruptcy under Section 57n of the Bankruptcy Act. This section in no way broadens the classes of provable debts, but limits the time within which provable debts must be presented and filed.

In re Roth & Appel, 174 Fed. 64, at 69.

In the second place, the Court, in rendering the *Smith* decision, errs in that it loses sight of the fact that the present Bankruptcy Act is silent upon a point which was always expressly provided for in previous acts of bankruptcy. The bankruptcy acts prior to that of 1898 made definite provision for contingent claims, and set forth a mode of procedure whereby they might be liquidated and proven in the bankruptcy proceeding. In the present act no such provision is made. The silence of the act of 1898 in this respect is significant. Courts by construction should not attempt to graft a provision upon an enactment which is not expressly provided for and which by implication was not intended to be covered.

The Supreme Court of the United States, in the cases of *Bards v. First National Bank, etc.*, 4 A. B.

R. 163-175, and *Carson et al. v. Chicago etc.*, 5 A. B. R. 814-822, has laid down a rule to be applied in the construction of the present Bankruptcy Act. These cases involve different questions from that presented here, but the questions presented required the Court to adopt a rule of construction in both cases. In laying down the rule, the Court, in the *Bards* case, said:

> "The bankrupt acts of 1867 and 1841, as has been seen, each contain a provision conferring in the clearest terms on the circuit and district courts of the United States concurrent jurisdiction of suits at law and in equity between the assignees in bankruptcy and an adverse claimant of the property of the bankrupt. *We find it impossible to infer that when Congress, in framing the act of 1898, entirely omitted any similar provision and substituted the restricted provisions of Section 23, it intended that either of those courts should retain the jurisdiction which it had under the obsolete provisions of the earlier acts.*" (Italics ours.)

In the *Carson* case, supra, the Court after referring to the fact that the Bankruptcy Act of 1867 contained certain provisions, went on to say:

> "The words in italics are omitted from the act of 1898. Was the omission without purpose? The omission of a condition is certainly not the same thing as the expression of a condition. Was it left out in words to be put back by construction? Taken from the certainty given by prior use and prior decisions and committed to doubt and controversy? There is a presumption against it. *When the purpose of a prior law is continued, usually its words are, and an omission of the words implies an omission of the purpose.*" (Italics ours.)

Applying the above rule of construction, there can be no question but that contingent claims not provided for in the Bankruptcy Act of 1898 are, by such omission, excluded from participation in the bankruptcy proceeding. This Court should not give such a construction to Section 63a (4) as to permit claims contingent at the time of the filing of the petition but maturing within the year after such filing, to be proven. Such a decision would in terms expressly permit the proof of contingent liabilities.

Thirdly, the *Smith* case is erroneous in that by its rule of broadening classes the Court has practically rendered nugatory subdivision 1 of Section 63a. Subdivision 4 must necessarily include subdivision 1, for the reason that obligations evidenced by a writing mentioned in subdivision 1 can mean nothing other than contracts, and, as in that subdivision it is provided that such obligations must be fixed and owing at the time of the filing of the petition, the prohibition would be rendered of no force and without effect by construing subdivision 4 as to be not so limited, and would permit the proof of claims under subdivision 4 which were expressly forbidden by subdivision 1. This Court needs no argument on the point that a statute must be so construed that force will be given to all its terms, and that where one construction would tend to nullify a provision of a statute while another would tend to give it effect, that construction should be adopted which will give effect to the statute as a whole and to all its provisions.

The foregoing reasons sufficiently show the vice of the *Smith* decision. The case can be supported neither in logic nor in law. It is at variancee with the trend of authority and with the Bankruptcy Act itself.

We hardly believe that counsel makes the point on page 15 of his brief seriously. Counsel admits that by the terms of the Bankruptcy Act itself the expression, "a person against whom a petition has been filed", must be construed to "include a person who has filed a voluntary petition". Yet he states that " by no stretch of judicial reasoning could this war- " rant the conclusion that the time of filing a volun- " tary petition is the same as the time of filing an in- " voluntary one". We do not follow him. The time of filing either petition is determined by the date when the petition is actually filed with the Court. No judicial reasoning is necessary to determine this fact. As by the terms of the Bankruptcy Act the expression "a person against whom a petition has been filed" shall include "a person who has filed a voluntary petition", Section 63a (1) of the Bankruptcy Act must be construed by this Court to read as follows: "a fixed liability absolutely owing at the " time of the filing of the petition (*by* or) against " him". The Bankruptcy Act provides that the one shall include the other, and consequently this Court must give the above construction to the phrase quoted above. Had Congress intended to limit subdivision 1 to involuntary cases, it would have by apt language, as in subdivision 2 of Section 63a, set

forth that intention. In subdivision 2 Congress *ex industria* shows that involuntary cases are intended, by using the expression: "due as costs taxable "*against an involuntary bankrupt,* who was at the "time", etc. (Italics ours.) No such expression is found in subdivision 1. We do not see how the Court can possibly adopt the construction contended for by counsel, and, if the truth were told, we do not think that counsel seriously believes that this Court will adopt such a construction.

We therefore submit that for the reasons stated above the claim of the Colman Company should be disallowed and expunged from the record, and that the order of the District Court sustaining the trustee's exceptions to the order of the referee should be affirmed.

Respectfully submitted,

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